Tidewater Construction Corporation *and* International Union of Operating Engineers, Local No. 147 a/w International Union of Operating Engineers, AFL–CIO. Case 5–CA–25463

May 2, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On August 11, 1998, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The General Counsel and Charging Party Union filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

The judge found, and we agree, that the Respondent did not violate the Act by refusing to consider hiring certain former employees as temporary replacements during a lockout. The Respondent lawfully initiated this lockout in response to the Union's offer, on behalf of striking employees, to discontinue its economic strike against the Respondent and to return to work without a collective-bargaining agreement.[1] Contrary to our dissenting colleague, we find that the lockout did not become unlawful because the Respondent expanded the lockout beyond current employees who had participated in the strike and refused to consider for hire six job applicants who, by virtue of their prior history of employment in the bargaining unit, were eligible to vote in a Board election held 9 months prior to the start of the lockout.

It has been settled law for over 35 years that an employer does not violate the Act by locking out its bargaining unit employees temporarily for the sole purpose of pressuring them to accept its bargaining proposals. *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965). The dissent acknowledges this principle, but contends that the inclusion in the lockout of former employees on the *Excelsior*[2] list of eligible voters for the prior election was unrelated to a lawful bargaining purpose. On this point, our colleague contends that, because the Respondent admittedly knew that every employee on the eligibility list had been a union member, including the six individuals who sought temporary replacement jobs during the lockout, the lockout was obviously motivated by antiunion considerations with the specific illegal purpose of discriminating against individuals because of their union membership and sympathies. We disagree.

The dissent's contention glosses over the fact that the individuals whose names appeared on the *Excelsior* list were members of the bargaining unit, which happened to be composed entirely of union members. Therefore, when the Respondent announced in its December 13, 1994 letter, that "we are locking out the bargaining unit employees," it was in fact locking out only union members simply because there were no nonunion unit employees. The Respondent, as further stated in the letter, was "unwilling to reemploy [the locked out unit employees] without first having reached agreement on a collective bargaining agreement."

This last statement is, of course, in complete accord with the bargaining purpose that the Supreme Court recognized as legitimate justification for a lockout in *American Ship*. Acceptance of the Respondent's bargaining proposals by the Union on behalf of *all* bargaining unit employees—strikers as well as the nonstrikers on the *Excelsior* list—stood as the lone obstacle to their reemployment. This was the clear message of the Respondent's letter to the Union on December 13. Nowhere in that letter or subsequent exchanges with the Union or unit employees did the Respondent ever convey that abandonment of union membership was also a pre-requisite to their return to work.

The Respondent did not lock out all union members, nor did it lock out any union members who did not have a reasonable employment nexus with the bargaining unit. The number of locked out unit employees, including both active employees who participated in the strike and former employees on the *Excelsior* list, constituted only one-third to one-half of the Union's total membership. Furthermore, the Respondent did hire one union member who was not on the list as a temporary employee.

Thus, contrary to the dissent's assertion, the Respondent *does* dispute that it locked out the six applicant employees and others on the *Excelsior* list "because of their union membership or affiliation." Indeed, that is a key contested issue in this case, and we find that the judge correctly resolved the issue in the Respondent's favor by

[1] The judge concluded that Sec. 10(b) barred an attack on the lockout from its inception. He went on to conclude that, in any event, the lockout at its inception was lawful on its merits. We agree with both conclusions. Our dissenting colleague agrees with the first point, and does not dispute (does not pass on) the second point.

[2] *Excelsior Underwear*, 156 NLRB 1236 (1966).

finding that the use of the *Excelsior* list in this case was reasonable.[3]

We acknowledge the dissent's point that, even at the lockout's commencement on December 13, 1994, there is a possibility that it excluded some persons on the *Excelsior* list whose last actual employment in the bargaining unit was more than a year earlier. (There is no specific evidence in this regard.) The *Daniel Construction*[4] formula used to determine election eligibility in this instance is an administrative eligibility formula, that is not meant to, and indeed cannot, given the various construction industry employment patterns, define with absolute accuracy the outer time limits of a former employee's reasonable expectation of reemployment in a bargaining unit with a fluctuating work force. We cannot join our dissenting colleague in finding that the Respondent's lockout of those on the list reveals a discriminatory antiunion purpose rather than a legitimate purpose of pressuring the Union and those who support it to accept the Respondent's terms for a collective-bargaining agreement.

Based on the foregoing, and for the reasons stated in the judge's decision, we agree with his conclusion that the Respondent's lockout remained lawful in all aspects. We therefore adopt his recommendation to dismiss the complaint.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

MEMBER LIEBMAN, dissenting in part.

I join my colleagues in adopting the judge's finding that Section 10(b) of the Act bars the complaint allegation that the lockout was unlawful from its inception. However, contrary to my colleagues, I would reverse the judge and find that the Respondent violated Section 8(a)(3) and (1) of the Act by expanding the lockout beyond its current employees and refusing to consider for employment six job applicants whom it knew or suspected were union members and supporters.

The facts are undisputed. In December 1993 the Respondent withdrew from a multiemployer bargaining unit, the Virginia Association Contractors (VAC), and notified the Union that it would not be bound by any VAC agreement that might succeed the existing Section 8(f) agreement set to expire in April 1994. Accordingly, in January 1994 the Union petitioned for a representation election and, following a Board-conducted election was certified on March 24, 1994, as the representative of the Respondent's heavy equipment operating engineers. The parties then bargained for an initial contract until reaching an impasse on October 3, 1994. The following day the Union began a strike in support of its contract demands.

On December 12, 1994, the Union ended the strike and, on behalf of the strikers, tendered unconditional offers to return to work. In response, the Respondent notified the Union that it was locking out the bargaining unit employees in support of its contract demands. Subsequently, at the Respondent's request, the Union provided the Respondent with a list of the 25 striking operating engineers making unconditional offers to return to work. Almost a year later, however, during the unfair labor practice investigation, the Respondent provided the Board with a list of 81 persons who it had, without notice to the Union, "locked out" as of December 13, 1994.[1]

On July 3, 1995, the Union filed a charge alleging, in relevant part, that since on or about January 5, 1995, the Respondent unlawfully refused to consider for employment persons it knew or suspected were union members or supporters, including Clarence Ellers, DeAnn Roche, Donald Savage, George Stapleford, Ronald Thompson, and Bruce Trager, none of whom were employees of the Respondent at the time of the October 4, 1994, strike.[2] With regard to the refusal-to-consider claim, the Respondent does not dispute that it excluded these applicants from consideration for hire as temporary replacements during the lockout, nor does it dispute that it excluded these applicants because of their union membership or affiliation.

Specifically, the Respondent stipulated to the fact that after the December 13, 1994 lockout, it periodically placed classified advertisements in local newspapers seeking applicants for employment for bargaining unit positions, and hired at least 40 persons for those positions. The Respondent further stipulated that it received employment applications during the lockout from Cla-

[3] Indeed, by the dissent's contrary reckoning, evidence of an alleged intent to discriminate *against* union members seems ironically to be based on Respondent's past history of employing *only* union members. If the Respondent had previously employed both union and nonunion members, then there would presumably be no basis for inferring discriminatory intent from locking out all bargaining unit employees, including former employees on the *Excelsior* list.

[4] 133 NLRB 264 (1961), as modified at 167 NLRB 1078 (1967). See also *Steiny & Co.*, 308 NLRB 1323 (1992).

[1] The Respondent included in the lockout list all of the employees on the *Excelsior* list prepared for the March 1994 representation election. The lockout list also included 10 names that were not on the *Excelsior* list and for which the Respondent offered no adequate explanation. There is no evidence, however, that any of these 10 individuals applied for work during the lockout.

[2] A seventh applicant named in the complaint, John Becker, was on the Respondent's payroll at the time of the strike and was informed by the Respondent that he was not hired because he was locked out.

rence Ellers, DeAnn Roche, Donald Savage, George Stapleford, Ronald Thompson, and Bruce Trager,[3] none of whom were actively employed by the Respondent as of October 4, 1994, when the strike commenced. It also stipulated that it "applied" its lockout to these applicants because they had been eligible to vote in the representation election conducted 9 months earlier, which resulted in certification of the Union. Further, as the judge found, the Respondent knew that all of its employees named on the *Excelsior* list were in fact union members, that they had been hired by the Respondent through the Union's hiring hall, and that "they would probably support the Union's bargaining demands."

The Supreme Court in *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), articulated the following framework for assessing employer motivation for discriminatory conduct:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motive is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight, an antiunion motivation must be proved to sustain the charge" *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.

388 U.S. at 34 (emphasis in original).

In my view, the record amply demonstrates that the Respondent's extension of the lockout to the six applicants who were not its employees on the date the lockout commenced was motivated by antiunion considerations. I, therefore, do not reach the question whether it was "inherently destructive" of employee rights. Cf. *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965), and *NLRB v. Brown Food Store*, 380 U.S. 278 (1965). I have analyzed the Respondent's conduct under *Great Dane* as having had a "comparatively slight" impact on employee rights. Accordingly, the next inquiry is whether the Respondent has come forward with evidence of a legitimate and substantial business justification for its conduct.

The Respondent contends that it was "privileged" to exclude from consideration all job applicants listed on the voting eligibility list because they had been hired through the Union's hiring hall, were union members, and were likely to be supporters of the Union's bargaining position. Such a contention constitutes an admission that the Respondent discriminated against them because of their union membership and sympathies. Indeed, the Supreme Court in *American Ship Building v. NLRB*, 380 U.S. 300 (1965), while holding that the lockout in that case was lawful in order to bring economic pressure to bear in support of legitimate bargaining demands, emphasized in its decision that "[t]here is no claim that the employer . . . locked out any employee simply because he was a union member." Id. at 312.

I further find that the fact that these six employees were eligible to vote in the representation election, which occurred 9 months prior to the lockout, does not justify the Respondent's inclusion of them in the lockout. Because of the nature of the construction industry, the Board utilizes the *Daniel Construction*[4] formula to determine voting eligibility in the election. As a result, employees are eligible to vote if they have been employed for 30 days or more within the 12 months preceding the eligibility date for the election, or if they have had some employment in those 12 months and have been employed for 45 days or more within the 24-month period immediately preceding the eligibility date. Thus, it is conceivable that some or all of the six applicants in this case had not worked for the Respondent for more than a year as of the date the lockout commenced. Under these circumstances, I find that the Respondent's extension of the lockout to all employees that were eligible to vote in the representation election went well beyond bringing legitimate economic pressure to bear in support of its bargaining demands. As such it was not "a measure reasonably adapted to the achievement of a legitimate end." *Brown Food Store*, 380 U.S. at 289. I therefore conclude that the Respondent has failed to establish that its conduct had a legitimate business justification.

Even assuming that the Respondent had met its burden of showing that it had a legitimate, business justification for its conduct, the next inquiry under *Great Dane* would be whether the General Counsel proved that

[3] The judge found that the Respondent did not inform these six applicants that they had been placed on its no-hire list, but rather were told only that there was no work available, despite the fact that the Respondent had advertised job openings in the bargaining unit.

[4] 133 NLRB 264 (1961), as modified at 167 NLRB 1078 (1967). See also *Steiny & Co.,* 308 NLRB 1323 (1992).

the Respondent's inclusion of these six applicants in the lockout was in fact motivated by union considerations. As detailed above, the record clearly establishes that the Respondent's conduct was motivated solely by the applicants' membership in and perceived support for the Union.

In my view, the judge and my colleagues in this case dispensed with the well-settled analysis that the Board applies to allegations that an employer's lockout of employees was unlawfully motivated. On this record, I would find that Respondent violated Section 8(a)(3) and (1) of the Act by including these six applicants in the lockout, thereby refusing to consider them for hire. I therefore dissent from my colleagues' adoption of the judge's dismissal of this complaint allegation.

Steven L. Sokolow, Esq., for the General Counsel.
A. W. VanderMeer Jr. Esq. (Clark & Stant, P.C.), for the Respondent.
John Singleton, Esq. (Gendler & Singleton) and *Richard Griffin, Esq.* and *Elizabeth Nadeau, Esq.,* for the Charging Party.

DECISION

Findings of Fact and Conclusions of Law

BENJAMIN SCHLESINGER, Administrative Law Judge. This proceeding involves the scope of a lawful lockout in the construction industry. The complaint alleges that the Respondent, Tidewater Construction Corporation, locked out not only its current employees but also employees who had worked for it in the past, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, 29 U.S.C.A. Sec. 151 et seq. Respondent denies that it violated the Act in any way.[1]

Respondent, a Virginia corporation with its principal place of business at Virginia Beach, Virginia, engages in heavy industrial and highway bridge construction, principally in the Southeastern United States. During the 12 months ending April 10, 1997, a representative period, Respondent sold and shipped goods valued in excess of $50,000 from Virginia to, and purchased and received at its Virginia Beach facility goods and services valued in excess of $50,000 from, points outside Virginia and performed services valued in excess of $50,000 in States outside Virginia. I conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also conclude that the International Union of Operating Engineers, Local No. 147 a/w International Union of Operating Engineers, AFL–CIO (Union), which has among its members 200–250 operating engineers, is a labor organization within the meaning of Section 2(5) of the Act.

For years Respondent was a member of the Virginia Association of Contractors (VAC) and was a party to successive Section 8(f) collective-bargaining agreements between VAC and the Union covering employees operating heavy equipment in all but seven counties of Virginia. The most recent agreement was in effect from May 1, 1991, through April 30, 1994. In or about December 1993 Respondent withdrew from VAC and notified the Union that it would no longer be bound by any agreement negotiated by VAC. In January 1994,[2] the Union filed a petition for a representation election and, following a Board-conducted election, was certified on March 24. Case 11–RC–5986 (formerly 5–RC–13985). Eligible to vote in that election pursuant to *Daniel Construction Co.*, 133 NLRB 264 (1961), as modified at 167 NLRB 1078 (1967), and as restated in *Steiny & Co.*, 308 NLRB 1323, 1324 (1992), were those employees employed during the payroll period immediately preceding February 16, the date of the direction of election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible were

> unit employees who had been employed for 30 days or more within the 12 months preceding the eligibility date for the election, or if they had some employment in those 12 months and have been employed for 45 days or more within the 24 month period immediately preceding the eligibility date.

On March 24 the parties began bargaining, but reached an impasse a half year later on October 3. The next day the Union commenced an economic strike to gain its contract demands, and about the same day Respondent implemented the economic terms of its final contract offer. The Union lost the strike. By letter delivered December 12, union business manager, Ray Davenport, announced the end of the strike and made "on behalf of all striking operating engineer employees . . . an unconditional offer to return to work immediately." Paul Rose, then Respondent's labor relations manager, replied by letter the next day, confirming:

> [O]ur telephone conversation of December 12, in which you advised me that the termination of the strike does not indicate that the Union has accepted our final contract proposal. To the contrary, you reaffirmed that the Union does not accept our offer.
>
> Please be advised that Tidewater Construction Corporation is unwilling to reemploy members of the bargaining unit without first having reached agreement on a collective bargaining contract. Accordingly, we hereby notify you that we are locking out the bargaining unit employees in support of our contract demand.
>
> We ask that you immediately notify all employees on whose behalf the offer to return to work [was made] of this lockout. Additionally, please provide us with a list of all striking employees on whose behalf the offer was made so that we can notify them directly.
>
> We continue to believe that our final contract offer is fair and reasonable under the circumstances and ask that you reconsider the Union's decision to reject it.

[1] The relevant docket entries are as follows: The Union filed its unfair labor practice charge on July 3, 1995, and the complaint issued on April 10, 1997. The hearing was held in Virginia Beach, Virginia, on November 5–7, 1997.

[2] All dates hereinafter refer to 1994, unless otherwise stated.

By letter dated December 23, Davenport supplied the names of 25 operating engineers "on whose behalf the offer to unconditionally return to work was made" and claimed that they would be entitled to back wages and fringe benefit contributions for all hours worked by temporary replacements because of the "unlawful lockout." By letter dated January 10, 1995, Rose thanked Davenport for his list of employees and stated his firm belief "that our lockout is within our rights under applicable law and that the former strikers have no entitlement to wages or benefits under the circumstances."

Up to this point, there is nothing remarkable about this dispute. Davenport was wrong and Rose was correct about the applicable law. An employer may lock out its employees for the purpose of bringing economic pressure to bear in support of a legitimate bargaining position. *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965). Acceptance of the Union's offer would leave Respondent vulnerable to another economic strike during the subsequent bargaining, and Respondent was privileged to engage in an economic lockout to protect itself. *Ancor Concepts, Inc.*, 323 NLRB 742 (1997). Respondent lawfully declared the lockout in immediate response to the strikers' offer to return to work. Cf. *Eads Transfer*, 304 NLRB 711 (1991), enfd. 989 F.2d 373 (9th Cir. 1993). Respondent's timely notification to the Union of the existence of the lockout permitted the strikers to evaluate their bargaining position. *Ancor Concepts*, 323 NLRB at 744 fn. 12.

What happened after the declaration of the lockout was that Respondent was determined to continue working. It hired replacements. That is not unlawful, either. An employer may hire temporary replacements during a lawful lockout. *Harter Equipment*, 280 NLRB 597 (1986), affd. sub nom. *Operating Engineers Local 825 v. NLRB*, 829 F.2d 458 (3d Cir. 1987).[3] Unbeknownst to the Union, however, Respondent not only locked out those who struck, those 25 who had asked for reinstatement, but also added persons to its list of people who were not to be hired and whom Respondent never identified to the Union.[4] It included, in addition to those who participated in the strike, all the employees who were eligible to vote in the representation election conducted 9 months earlier, some of whom, by December 13, had not been employed for more than 2 years and would not have been eligible to vote in an election had one been held that day. It also included 16 names which appeared on neither the *Excelsior*[5] list nor the list of strikers that Davenport sent at Rose's request.

From Respondent's refusal to consider hiring the individuals other than the strikers, the General Counsel contends that the lockout was illegal, relying on *Ancor Concepts*, 323 NLRB at 744, in which the Board advised:

> Following a declaration of a lawful lockout, an employer that seeks to continue to invoke *Harter* . . . to justify its failure to reinstate striking employees upon their unconditional offer to return must refrain from engaging in conduct inconsistent with an economic lockout. Such inconsistent conduct ends the lawful lockout, and removes the employer's privilege of invoking *Harter*.

In *Ancor Concepts*, the employer lost its "privilege" by advising the Union that the replacements were permanent and that the strikers would be placed on a preferential recall list. That advice was inconsistent with the requirement that, if a lockout is to be lawful, replacements may be temporary only. As a result, the failure to reinstate the striking employees became inherently destructive of employee rights under *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

Similarly, in *Schenk Packing Co.*, 301 NLRB 487 (1991), the complained-of conduct directly affected the locked out strikers. There, the employer and the union had a collective-bargaining relationship for more than 20 years. Negotiations for a new agreement stalled, and the union threatened a strike. The employer asked for 2 weeks' notice to permit it to regulate its purchase of cattle for slaughter to avoid the potential for spoilage. When the union agreed to give only 48 hours' notice, the employer began a partial lockout. Then, it issued a memorandum notifying the employees that it would institute a total lockout, during which no union members would be employed; it would use only nonunion employees as replacements; and, if locked out union employees resigned from the union, they might be hired temporarily for the duration of the lockout.

The Board found that the unavoidable effect and thus, unstated purpose of the lockout was to discourage the employees' membership in the union by denying employment to those who maintained that status and concluded that the employer's conduct violated Section 8(a)(3) and (1) of the Act. Using *American Ship Building* for guidance, the Board agreed that an employer may lawfully lock out its unit employees temporarily for "the sole purpose of applying economic pressure in support of its valid bargaining position" but noted that the situation before it was the one distinguished by the Court:

> There is no claim that the employer locked out only union members, or locked out any employee simply because he was a union member; nor is it alleged that the employer conditioned rehiring upon resignation from the union. [380 U.S. at 312.]

In *Schenk Packing*, to the contrary, there was more than ample evidence of a violation. First, the memorandum conditioned reemployment rights solely on union membership. Second, during the lockout, the employer reinstated 10 employees who resigned from the union, while continuing the lockout against the rest who remained union members.

There is no evidence here of any conduct like that present in *Ancor Concepts* or *Schenk Packing*. Respondent neither announced that it was hiring permanent replacements nor encouraged the striking employees to resign from the Union. Rather, it announced a lawful goal—to bring about a settlement of its labor dispute on favorable terms—and never deviated from that goal or engaged in conduct inconsistent with that goal.

In so concluding, I reject the contentions of the General Counsel and the Union that Respondent's locking out of an overly broad number of employees and failure to timely and

[3] The Union's brief contends that *Harter Equipment* was incorrectly decided. That is more appropriately directed to the Board.

[4] The individuals are specifically identified on the list as "Operating Engineers Local 147—LOCKED OUT EMPLOYEE."

[5] *Excelsior Underwear*, 156 NLRB 1236 (1966).

accurately advise the Union that it would not consider for hire various employees other than the striking employees converted the lawful lockout into an illegal one. A lockout by its terms is "the withholding of employment by an employer from its employees for the purpose of either resisting their demands or gaining a concession from them." 2 Hardin, *The Developing Labor Law*, at 1129 (3d ed. 1992). The lockout's legality is tested by its effect on the employees who worked for Respondent or former employees who engaged in a strike and offered to return to work for that strike. As to them, the lockout, without more, was legal. Respondent did not lock out the strikers because they were Union members, but because Respondent wanted to pressure them to agree to its last offer. It did not condition their rehire upon their resignation from the Union.

The contention that Respondent misled the Union by not revealing the extent of the lockout is not, at least up to now, what the Board has required of employers using this weapon. For example, in *Eads Transfer*, the Board found fault with the employer, because, without making any reference to a lockout or to bargaining demands and having hired replacements during a strike, the employer simply refused to reinstate the economic strikers who had unconditionally offered to return to work. So, *Eads Transfer* instructs that the employer must announce that there is a lockout before or in immediate response to the strikers' unconditional offers to return to work, and must announce "the reason for its action so that the union and the employees then know what choices are left to them." 304 NLRB at 713 fn. 17. That is precisely what Respondent did.

The General Counsel and the Union complain that the lockout was unlawful because Respondent selectively locked out all the employees but one, David Wimbish, who had crossed the picket line during the strike, but before the lockout, and resigned from the Union. He was permitted to continue to work for Respondent and worked until about October 29, 1995. It was proper for Respondent to distinguish between him, a current employee who apparently was willing to abandon the Union's demands, and those who were strikers and still opposed Respondent's contract demands. If the rationale underlying the allowance of a lockout is to put pressure on a union to accept the employer's bargaining demands, it would hardly serve that purpose to lock out Wimbish, who worked, despite the strike, and did not support the Union's strike. *Shenck Packing* is inapplicable, because Wimbish had already returned to work. Respondent did not induce him to return to work if he resigned from the Union.[6]

The General Counsel devotes an entire section of his brief to support the contention that the lockout was unlawful from its inception because Respondent hired permanent, rather than temporary replacements. The status of the replacements was neither alleged in the complaint nor litigated by the parties, although it was briefed by Respondent. The General Counsel's argument rests solely on his presumption that Respondent had the burden to prove that the replacements were temporary and, because it failed to meet its burden, the replacements must be permanent. But the violation is based on the hiring of permanent replacements, and that is the General Counsel's burden to prove. Furthermore, even if the General Counsel's presumption were valid, the General Counsel may rely on it only if he has given notice to Respondent of what it has the burden to prove. Here, it did not. Finally, assuming that the sole violation stems from Respondent's failure to rehire the strikers or to hire the applicants during the lockout, Respondent never relied on its hiring of permanent employees to support its action. If it had, it would have had the burden of proof on the issue; but that is not what occurred.

In sum, this portion of the complaint is without merit. To the extent that what is being complained about is the validity of the lockout, which occurred more than 6 months prior to the filing of the unfair labor practice charge, the proceeding is also barred by Section 10(b) of the Act.

The complaint further alleges that, after the declaration of the lockout, Respondent refused to hire, in addition to the strikers, other persons because they were known or suspected union members and supporters. Although, since the lockout commenced, Respondent has hired 40 employees into positions within the certified bargaining unit, 6 applicants (on the *Excelsior* list, but not former strikers) who testified, or would have testified, were told only that there was no work available, despite the fact that Respondent had advertised for jobs in the bargaining unit.[7] Two employees on Respondent's list, one a former striker, were told that they were not hired because they had been locked out.

Respondent's counsel initially posited that the lockout list contained the names of only strikers and individuals named in the *Excelsior* list. It turned out during the testimony that Respondent's list of persons it would not hire consisted of 81 names: 61 employees who were on the *Excelsior* list, some employees who were hired after the preparation of the *Excelsior* list, and another 16 persons. Respondent then contended that one employee was terminated for cause before the strike and that five others participated in the strike, even though they were not named in Davenport's list. Then, Rose testified that, if any other names were included in the lockout list, that was a clerical error, but later he testified, and Respondent's counsel confirmed, that some names were included because the individuals engaged in picket line misconduct during the strike. Ultimately, however, Respondent withdrew the contention of picket line misconduct; and there was no explanation for the inclusion of 10 of the 16 names.[8]

From Respondent's numerous shifts in position, the General Counsel contends that the reason for their inclusion must have

[6] Respondent contends that the Union knew that Wimbish remained in Respondent's employ; and, thus, this claim is barred by Sec. 10(b). I find that the Union believed that Wimbish was working outside of the bargaining unit until the spring of 1995, which was within the 6 months of the filing of the charge.

[7] There is no question that the Union did not know that Respondent was refusing to hire employees on the *Excelsior* list. Indeed, Respondent's attorney was clearly surprised that the list included the 10 employees. As a result, as to those applicants, this proceeding is not barred by Sec. 10(b) of the Act. *Russell-Newman Mfg. Co.*, 167 NLRB 1112, 1115 (1967), enfd. 406 F.2d 1280, 1281 fn. 1 (5th Cir. 1969).

[8] Of the 16 names, one employee appears to have been discharged for cause, and 3 were on the payroll at the time of the strike. Two names may be duplications. That leaves 10.

been that Respondent identified them as union supporters. I do not believe that the inclusion of these names could have resulted from clerical error, particularly because so many were added to the list, and there was no explanation of where the clerks may have obtained these names. At least as to some on the list, they worked at separate projects that were being performed by Respondent under individual collective-bargaining agreements with the Union, which agreements continued in effect. At one of the projects the employees struck in violation of a no-strike clause in that agreement and in support of the employees who are involved in this dispute. Respondent probably added their names to its list of persons who were not to be later hired because of their support for the principles of the strike. There is no explanation for the inclusion of the remaining persons, but there was also no proof that the 10 were even union members, ever applied for employment, or were refused employment.

In addition, there was no proof that Respondent did not consider for employment other union-represented operating engineers, consisting of the other half to two-thirds of the union membership. In fact, Respondent hired one union member, who was not on its no-hire list. It also hired union business representative, Terry Williams, but the project superintendent recognized him as a union witness during a state court proceeding related to the strike. A day or two later, craft superintendent Lewis Collier asked Williams if there were any other [union] operators working for the Respondent, or whether Williams was the only one who had "slipped through the cracks." Despite originally promising Williams that he would be transferred to another jobsite for 9 months, Respondent laid him off after 4 days.[9]

The General Counsel contends that the true motive was the elimination of the Union's members from the unit. Thus, Respondent knew that the only operating engineers that it had hired during the past 2 years, under the VAC agreement, had been union members.[10] By using the *Excelsior* list, Respondent ensured that it would not hire those persons. In addition, the General Counsel and the Union contend, Respondent's use of the *Excelsior* list was inappropriate, because the *Daniel-Steiny* rule was intended to determine the employees who would be eligible for voting but did not describe employees for the purposes of a lockout. Whatever the merits of that position is, Respondent made plain that it wanted the employees (or the Union)[11] to accept its bargaining demands. If the employees did so, they could return to work. Respondent is allowed to exert pressure on those who could reasonably be expected to apply for employment and who the employer believed would support the employees' bargaining demands by hiring those that it believes will support its position. So, Respondent's list was based less on union membership than the fact that these employees were sent to Respondent through the Union's hiring hall; and they would probably support the Union's bargaining demands.

Besides, the use of the *Excelsior* list was not wholly groundless. In the construction industry, there is a "pattern of employment that does not reflect a prevalence of employees working regular workweeks for extended uninterrupted periods of time with the same employer." *Steiny & Co.*, 308 NLRB at 1325. The basis of the Board's expansion of the list of eligible voters in the construction industry is that those currently employed are not the only persons who can be expected to be employed by an employer. Rather, there are others "who have a reasonable expectation of future employment with the [e]mployer, and thereby have a continuing interest in the [e]mployer's working conditions." *Daniel Construction*, 167 NLRB at 1081. The Union, institutionally, on behalf of all its members, and the members themselves, had an interest in the outcome of this strike. Thus, the Union counsel offered to prove that, shortly after the commencement of the strike, the Union assessed all its members working within the construction industry an amount to provide for picket line activity. In addition, the Union's brief argues that the employees who were not informed that they were on Respondent's no-hire list were not in a position to induce the Union to accept Respondent's final offer so that they could return to work. That indicates that the employees had some sort of continuing interest in working for Respondent; otherwise, the brief would not have used the words "return to work."

I conclude that Respondent was justified in using the *Excelsior* list. The remaining issue concerns the additional 10 employees included on its no-hire list. I have previously found that Respondent gave no credible basis for their inclusion, and I might on that basis be inclined to find a violation.[12] However, there was no proof that the 10 were all union members and there was no proof that any of them applied for employment. On this basis, the General Counsel has not proved a violation.

There are a variety of other arguments made by the General Counsel and the Union. The Union complains that the lockout could not have been designed to advance Respondent's bargaining position, because its final offer expired by its terms on April 30, 1997. That fact, however, is the result solely of the Union's failure to accept Respondent's offer by then. The General Counsel suggests that, once Respondent implemented its last offer, there was no reason for the lockout. However, Respondent sought a contract that would give it industrial peace. The mere implementation of the offer would not commit the Union not to strike.

[9] The complaint does not contain a separate allegation involving Williams, and there would be no reason in these circumstances to find a violation in any event. *Sunland Construction Co.*, 309 NLRB 1224, 1230–1231 (1992).

[10] From at least January 1, 1992, until October 1994, every operating engineer who worked for Respondent within the Union's geographic jurisdiction was a member of the Union; and some of them worked continuously for Respondent, being transferred from project to project.

[11] This record does not show whether the strike was created by the vote of the employees who actually went on strike, or by the Union as a whole.

[12] Although the Board does not give an employer "carte blanche to refuse to permit prounion employees to return to work during a strike or to hire them as strike replacements," *Sunland Construction Co.*, 309 NLRB 1224, 1231 fn. 41 (1992), the Board has never made the same pronouncement about the hiring of prounion employees during a lockout.

On these findings of fact and conclusions of law and on the entire record,[13] I issue the following recommended[14]

ORDER

The complaint is dismissed.

IT IS FURTHER ORDERED that the agreement entered into during the hearing prohibiting the parties from disclosing the contents of certain testimony and exhibits be, and the same hereby are, continued in full force and effect and that any exhibit introduced in evidence under seal will continue to be maintained under seal.

[13] I have not considered (1) the General Counsel's representation of off-the-record discussions regarding Respondent's compliance with subpoenas duces tecum that Respondent was unable to compile a complete set of job applications received during the lockout; and (2) Respondent's representation in its brief, unsupported by record evidence, that the names of eight employees erroneously added to its lockout list have been removed.

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.